

86 1791

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

Supreme Court, U.S.
FILED

MAY 6 1987

JOSEPH F. SPANOL, JR.
CLERK

TRAVIS WARD
Petitioner
v.
SENTRY TITLE CO., INC.
Respondent

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

HIRAM C. EASTLAND, JR.
(Counsel of Record)
JOANNE E. BREGMAN
(Counsel for Petitioner)
Eastland Law Offices
6360 I-55 North, IBM Building
Suite 336
Jackson, Mississippi 39211
(601) 956-0154
JAMES P. COLEMAN
(Counsel for Petitioner)
115 East Quinn
Ackerman, Mississippi 39735
MICHAEL E. ROHDE
MICHAEL KEELEY
(Counsel for Petitioner)
TRUE, ROHDE, & McLAIN
8080 Central
9th Floor
Dallas, Texas 75206-187



IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

TRAVIS WARD
Petitioner
v.
SENTRY TITLE CO., INC.
Respondent

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Petitioner prays that a writ of certiorari issue to review the judgment of the U. S. Court of Appeals for the Fifth Circuit in the above mentioned case, entered January 7, 1987.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit Court of Appeals decision violates the *Erie* doctrine since it fails to apply the controlling substantive state law on the issue of resulting trust?
2. Whether the panel decision violated fundamental principles of due process when it reversed the District Court's favorable resulting trust ruling based on an erroneous conclusion that the resulting trust claim had been adjudicated by a prior panel?
3. Whether the panel's holding that it cannot disregard the precedent of a prior panel even if it perceives the prior decision to be in error in applying state law violates fundamental constitutional principles of due process?
4. Whether the panel's refusal to review the erroneous precedent of the prior panel regarding a determination controlling state substantive law of resulting trusts violates fundamental constitutional principles of equal protection?

5. Whether the panel's decision violated the Rules of Decisions Act when it erred in not applying the controlling state substantive law on resulting trust?
6. Whether the manifest injustice and prejudice to innumerable future litigants on state issues in the Fifth Circuit, resulting from the Court of Appeals decision warrants exercise of the Supreme Court's broad supervisory authority?
7. Whether, at a minimum, the circumstances of this case warrant certification of the resulting trust issue to the Texas Supreme Court?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner Travis Ward and the Respondent Sentry Title Co., Inc., as well as Home Engineering, Inc. and Alan Whatley. Home Engineering, Inc. and Alan Whatley are not named as respondents herein because they are not affected by the issues presented in this petition.

TABLE OF CONTENTS

	<i>Page</i>
<i>Questions Presented</i>	<i>i</i>
<i>List of Parties</i>	<i>ii</i>
<i>Table of Authorities</i>	<i>iv</i>
<i>Opinions Below</i>	<i>1</i>
<i>Jurisdiction</i>	<i>1</i>
<i>Constitutional Provisions, Statutes Involved and Rules of the Fifth Circuit Court of Appeals</i>	<i>2</i>
<i>Statement of the Case</i>	<i>4</i>
<i>Reasons for Granting the Writ</i>	<i>7</i>
1. The Decision of the Fifth Circuit Violates <i>Erie</i> and Its Underlying Policies	<i>7</i>
2. The Decision of the Fifth Circuit Violates the Due Process Clause of the Fifth and Fourteenth Amendments	<i>12</i>
3. The Decision of the Fifth Circuit Violates Peti- tioner's Right to Equal Protection Under the Laws	<i>15</i>
4. The Decision of the Fifth Circuit Violated the Rules of Decision Act	<i>17</i>
5. In Light of the Constitutional Violations and Mani- fest Injustice Brought About For Petitioner and Innumerable State Law Litigants in Federal Court, This Court Should Exercise Its Supervisory Authority	<i>17</i>
<i>Conclusion</i>	<i>21</i>
<i>Certificate of Service</i>	<i>22</i>

TABLE OF AUTHORITIES

Cases:	Page
<i>Bankers Life and Casualty Co. v. Holland</i> , 346 U.S. 379 (1953)	18
<i>Bellotti v. Baird</i> , 428 U.S. 132 (1975)	18
<i>Bernhardt v. Polygraphic Co.</i> , 350 U.S. 198 (1956).....	8
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	18
<i>Carey v. Piphus</i> , 435 U.S. 247 (1977)	13
<i>Cohrs v. Scott</i> , 338 S.W.2d 127 (Tex. 1960).....	11, 12
<i>Defense Corp. v. Lawrence Co.</i> , 336 U.S. 631 (1948).....	18
<i>Dorchy v. Kansas</i> , 264 U.S. 286 (1923)	18
<i>Erie Railroad Co. v. Tompkins</i> , 304 U.S. 64 (1938).....	7, 8, 9, 12, 13, 16, 17, 18,
<i>Estate of Spiegel v. Commissioner of Internal Revenue</i> , 335 U.S. 701 (1949)	18
<i>Ex Parte v. Union Steamboat Co.</i> , 178 U.S. 317 (1900)	14
<i>First Southern Federal Savings v. First Southern Savings</i> , 614 F.2d 71 (5th Circuit 1980)	8, 13
<i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970)	13, 14
<i>Hammett v. McIntire</i> , 365 S.W.2d 844 (Tex. Civ. App.— Houston 1962).....	12
<i>Hanna v. Plumer</i> , 380 U.S. 460 (1965)	16
<i>Harris v. Sentry Title Co., Inc.</i> , 806 F.2d 1278 (5th Circuit 1987)	1, 6, 8, 15, 17
<i>Harris v. Sentry Title Co., Inc.</i> , 727 F.2d 1368 (5th Circuit 1984)	1, 5, 8, 20
<i>Harris v. Sentry Title Co., Inc.</i> , 715 F.2d 941 (5th Circuit 1983)	1, 4, 5, 6, 8, 9, 10, 11, 14, 19, 20
<i>Helvering v. Stuart</i> , 317 U.S. 154 (1942).....	18
<i>Huddleston v. Dwyer</i> , 322 U.S. 232 (1944).....	18
<i>Huffington v. Upchurch</i> , 532 S.W.2d 576 (Tex. 1976)....	5
<i>In Re Irving</i> , 600 F.2d 1027 (2d Cir. 1979).....	6

<i>In Re Sanford Fork and Tool Co.</i> , 160 U.S. 247 (1895)...	14
<i>Keebler Co. v. Rovira Biscuit Corp.</i> , 624 F.2d 366 (1st Circuit 1980)	13
<i>Knox v. Levy</i> , 251 S.W.2d 911 (Tex. Civ. App.—Texarkana 1952)	11
<i>Kremer v. Chemical Construction Corp.</i> , 456 U.S. 461 (1982)	13
<i>Lassiter v. Dept. of Social Services</i> , 452 U.S. 18 (1981)...	13
<i>Lehman Brothers v. Scheir</i> , 416 U.S. 386 (1973)	18
<i>Maternally Yours, Inc. v. Your Maternity Shop, Inc.</i> , 234 F.2d 538 (2nd Circuit 1956)	13
<i>Mathews v. DeCastro</i> , 429 U.S. 181 (1976)	15
<i>McDaniel v. Sanchez</i> , 452 U.S. 130 (1981)	6
<i>Mills v. Rogers</i> , 102 S. Ct. 2442 (1986)	18
<i>Missouri, ex rel v. Public Service Commission</i> , 273 U.S. 26 (1926)	18
<i>Montana v. U.S.</i> , 440 U.S. 147 (1970)	14
<i>Mulliane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306 (1950)	13
<i>Olcott v. Bynam</i> , 84 U.S. & 44 (1873)	11
<i>Palmer v. Fuqua</i> , 641 F.2d 1146 (5th Circuit 1981)	5
<i>Pasterchik v. United States</i> , 446 F.2d 1367 (9th Circuit (1972)	6
<i>Pederson v. Smith Williamsport Area School District</i> , 677 F.2d 312 (3rd Circuit 1982)	13
<i>Pipeline Co. v. U.S.</i> , 312 U.S. 502 (1941)	14
<i>Rankin v. Naftalis</i> , 557 S.W.2d 949 (Tex. 1976)	5
<i>Sprague v. Ticonic</i> , 307 U.S. 161 (1939)	14
<i>United Home Rentals, Inc. v. Texas Real Estate Commission</i> , 716 F.2d 324 (5th Circuit 1983)	13
<i>United Roasters, Inc. v. Colgate-Palmolive Co.</i> , 485 F. Supp. 1041 (E.D.N.C. 1979)	6
<i>White v. Murtha</i> , 377 F.2d 428 (5th Circuit 1967)	17
<i>Wichita Royalty Co. v. City National Bank</i> , 306 U.S. 103 (1938)	7, 8



Constitutional and Statutory Provisions

	<i>Page</i>
United States Constitution, 5th Amendment	2
United States Constitution, 14th Amendment, Section 1	2
Judiciary & Judicial Procedure, District Courts: Jurisdiction, 28 U.S.C. §1340, 1345 (1948)	4
Rules of Decision Act, 28 U.S.C. Section 1652 (1976)	3
Federal Rules of Appellate Procedure, 28 U.S.C., Rule 35	3
Federal Rules of Civil Procedure, 28 U.S.C., Rule 52(a)	3
Internal Operating Procedures, Court of Appeals for the Fifth Circuit	3
Texas Rules of Appellate Procedure, Rule 114	4

OPINIONS BELOW

The most recent opinion of the United States Court of Appeals for the Fifth Circuit is reported at 806 F.2d 1278 (5th Cir. 1987) ("*Sentry III*"). The Court's two prior opinions, which are relevant to the Court's consideration of this petition, are reported at 727 F.2d 1368 (5th Cir. 1984) ("*Sentry II*") and 715 F.2d 941 (5th Cir. 1983) ("*Sentry I*"). All three opinions are reprinted in the appendix hereto at D, E, and F.

The Judgment of the United States District Court for the Northern District of Texas (Hill, D.J., now a Judge of the Court of Appeals of Fifth Circuit), has not been printed. It is reprinted, together with the district court's Findings of Fact and Conclusions of Law on Petitioner Ward's Resulting Trust Claim in the appendix hereto, at I and J.

JURISDICTION

Federal jurisdiction was invoked under 28 U.S.C. Sections 1340, 1345 (1980) when the Internal Revenue Service of the United States of America removed this case to the United States District Court for the Northern District of Texas from the District Court of Dallas County, Texas, on June 2, 1975. Judgment was entered for Petitioner on January 29, 1982.

On Respondent's appeal, the Fifth Circuit entered its opinion on September 26, 1983, reversing the District Court's judgment, and remanding the case for further proceedings. Petitioner's Motion for Panel Rehearing and Suggestion for Rehearing En Banc were denied. On March 12, 1984, the Court entered its second

opinion, *Sentry II*, to consider cross motions to recall the Court's mandate. The Court recalled its prior mandate, but modified its prior opinion only slightly, and reversed and remanded the case for further proceedings. Upon remand, judgment was again entered for Petitioner, on November 11, 1985. That decision was again repealed by Respondent, and on January 7, 1987, the Fifth Circuit entered its opinion again reversing the District Court's judgment. Petitioner's Motion for Panel Rehearing and Suggestion for En Banc Rehearing were summarily denied on February 5, 1987. Petitioner's Motion to Stay Mandate was granted on February 23, 1987.

The jurisdiction of this court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. Section 1254 (1) (1966).

CONSTITUTIONAL PROVISIONS, STATUTES INVOLVED AND RULES OF THE FIFTH CIRCUIT COURT OF APPEALS

United States Constitution, 5th Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service or time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, 14th Amendment, Section One:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rules of Decision Act, 28 U.S.C. Section 1652 (1976)
Section 1652. State laws as rules of decision.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 26, 1948, c. 646, 62 Stat. 944.

Rule 35, Federal Rules of Appellate Procedure, 28 U.S.C.
Determination of Causes by the Court En Banc.

(a) When Hearing or Rehearing En Banc Will Be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involved a question of exceptional importance.

(As amended April 1, 1979, eff. Aug. 1, 1979.)

Internal Operating Procedure, Court of Appeals for the Fifth Circuit. Suggestion for Rehearing En Banc.

Extraordinary Nature of Suggestions for Rehearing En Banc— A suggestion for rehearing en banc is an extraordinary procedure which is intended to bring to the attention of the entire Court a precedent-setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court or Fifth Circuit precedent. **Alleged errors in the determination of state law, or in the facts of the case, are matters for panel rehearing but not for rehearing en banc.** (emphasis supplied)

Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.

Rule 52. Findings by the Court

(a) Effect

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for pur-

poses of review. **Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.** The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b) (emphasis supplied).

**Rule 114. Texas Rules of Appellate Procedures
Certification of Questions of Law by United States Courts.**

(a) **Certification of Questions of Law.** The Supreme Court of Texas may answer questions of law certified to it by the Supreme Court of the United States or a Court of Appeals of the United States when requested by the certifying court, if there are involved in any proceedings before the certifying court questions of law of this state which may be determinative of the cause then pending and as to which it appears to the certifying court that there is no controlling precedent in the decisions of the Supreme Court of Texas. The Supreme Court may, in its discretion, decline to answer the questions certified to it.

STATEMENT OF THE CASE

The interpleader action in *Harris v. Sentry Title Co., Inc.* ("Sentry I")¹ was originally filed in the Texas state district court. The case was removed to federal court pursuant to 28 U.S.C. Sections 1340 and 1345, when the IRS asserted a claim against the interpleader fund.

Petitioner filed a Motion to Remand² and Brief in Support³ thereof, to remand the case to State Court subsequent to satisfaction of the IRS claim and dismissal of the IRS as a party. Nevertheless, the District Court found it would be in the interest of justice to allow the case to remain in federal court rather than delay the litigation further by remanding it to state court.⁴

¹*Sentry I*, 715 F.2d 941 (5th Cir. 1983).

²See Appendix G.

³See Appendix H.

⁴*Sentry I*, 715 F.2d at 943, 945.

Upon applying Texas Supreme Court precedent regarding the law of constructive trusts to the undisputed facts in this case, the District Court imposed a constructive trust on the proceeds of the sale of the Dyckman property, or the property or transaction over which this dispute arose. The District Court ruling imposing a constructive trust is based on the fact that the Dyckman property was acquired by Respondent on behalf of Petitioner pursuant to an oral agreement, a fiduciary relationship existed between the parties regarding the acquisition, and the fiduciary relationship encompassed or was thus directly related⁵ to the Dyckman property.

As pertinent to this case, upon ruling favorably on Petitioner's constructive trust claim the District Court did not find it necessary to rule upon Petitioner's resulting trust claim.

Upon appeal to the Court of Appeals for the Fifth Circuit, the Court of Appeals in an unprecedented interpretation of Texas state law found that the "critical"⁶ issue in the case involved the **sufficiency of the prior fiduciary relationship** for purposes of supporting imposition of a constructive trust. While specifically accepting the District Court findings that a prior **fiduciary relationship** existed between the parties encompassing or thus **directly related** to the acquisition of the Dyckman property, the Court of Appeals **held** that Texas law requires that a constructive trust **must be supported by a prior fiduciary relationship** which is separate, independent and **unrelated**⁷ to the subject transaction.⁸ We respectfully submit that this conflicts with all prior Texas law, a holding from which, up to now, we have been wholly unable to obtain judicial relief.

⁵See Appendix L, Accord, *Rankin v. Naftalis*, 557 S.W.2d 949 (Tex.) 1976), *Huffington v. Upchurch*, 532 S.W.2d 576 (Tex. 1976); *Palmer v. Fuqua*, 641 F.2d 1146, 1155-1157, 1160 (5th Cir. 1981) (applying Texas law). A constructive trust imposed for breaches of fiduciary relationships is of course an exception to the Statute of Frauds.

⁶*Sentry II*, 727 F.2d 1368, 1370 (5th Cir. 1984).

⁷*Sentry I*, 715 F.2d at 948.

⁸ For a graphic illustration of the undisputable fact that the controlling Texas Supreme Court precedent recognizes that where a fiduciary relationship which is breached encompasses or is directly related to the transaction at issue, it is sufficient to support a constructive trust, please refer to Appendix L.

While the Fifth Circuit in the first appeal referred to the elements of a resulting trust,⁹ the Court stated that the "...general rule known as 'resulting trust' is not raised in this case." *Sentry I*, 715 F.2d at 949, n. 4. We earnestly urge that if "resulting trust" was not raised, then it was not before the Fifth Circuit for decision. It remained an open, undecided issue, awaiting the further action of the District Court.

Upon remand, the District Court, consistent with the panel's finding that the resulting trust claim was not involved in the appeal, and consistent with the District Court's prior ruling wherein it was not necessary to rule on the resulting trust claim since it had imposed a constructive trust, concluded that imposition of a resulting trust was appropriate under Texas law.¹⁰

Importantly, subsequent to the District Court decision, in prejudice to Petitioner's right for appellate review, a new panel of the Fifth Circuit held that it could not review the resulting trust claim (1) because the prior panel had adjudicated the claim and (2) because of "...our firm rule that one panel cannot disregard the precedent set by a prior panel even though it perceives error in the precedent."¹¹

Petitions for Panel Rehearing and Rehearing en banc were filed and summarily denied.

As discussed below, Petitioner respectfully submits that the Court of Appeals decision is hopelessly irreconcilable with Texas state law and with our judicial system's paramount respect for

⁹*Sentry I*, 715 F.2d at 946. Petitioner submits that this discussion constitutes *obiter dictum* and is not binding on any court. *Pasterchik v. United States*, 466 F.2d 1367, 1368 (9th Cir. 1972); *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1041, 1046 (E.D.N.C. 1979) See also *McDaniel v. Sanchez* 425 U.S. 130, 141 (1981). Claims and issues discussed in comments which constitute *obiter dictum* are not "adjudicated" and remain open for decision. *In re Irving*, 600 F.2d 1027, 1034 (2d Cir. 1979).

Furthermore, as demonstrated by Appendix M the panel's dictum plainly constitutes an erroneous interpretation of the Texas courts law on resulting trust. For example, of all the Texas decisions enunciating the elements of a resulting trust, none of the decisions support the panel's comments regarding resulting trusts.

¹⁰See Appendix J.

¹¹*Sentry III*, 806 F.2d at 1282. In concluding that the resulting trust issue had already been decided the new panel stated that it could "see no grounds or 'manifest injustice' requiring a reexamination of the Court's prior opinion." *Id.*

due process and equal protection of the laws.

Moreover, consistent with the spirit of *Erie* and the policy concerns of our federal judicial system of providing an equitable administration of the laws and avoiding decisions which promote forum shopping, this Court is compelled as the last avenue of relief to review and correct the actions of the Court below.

The concepts of due process, equal protection of the laws, and appropriate application of state laws by our federal judicial systems, are among the most critical rights of the individual inherent in a fair administration of the laws by our federal system of government.

Plainly, when these most basic concepts protecting the rights of the individual and state law litigants in the federal system are threatened, the attention of this Court is warranted.¹²

REASONS FOR GRANTING THE WRIT

1. The Decision of the Fifth Circuit Violates *Erie* and its Underlying Policies

This case presents the Court with judicial and constitutional questions of exceptional public importance.

As will be shown below, the Circuit Court's ruling is in clear contravention of the federal judicial policy well-established in *Erie*¹³ since it is hopelessly irreconcilable with controlling Texas law as declared by its highest Court. Moreover, the decision undermines the dual aims of *Erie*: the avoidance of inequitable administration of the laws and the discouragement of forum shopping.

While the present case is not a diversity case, the law is well-settled that the principles of *Erie* are equally applicable to diver-

¹²Importantly, the procedural history of this case is similar in respect to *Wichita Co. v. City Bank*, 306 U.S. 103 (1938), a case, likewise, involving important questions regarding the law of fiduciary relations for commercial transactions in Texas. Significantly, even though as here, the Court of Appeals had denied two rehearings, the Supreme Court granted certiorari on the basis of *Erie*. Moreover, in light of the significant constitutional questions raised herein, Petitioner respectfully submits there is even more reason for granting the writ in this matter.

¹³*Erie Railroad Co. v. Thompkins*, 304 U.S. 64 (1938).

sity and non-diversity cases. *Bernhardt v. Polygraphic Company*, 350 U.S. 198, 200 (1956); *Wichita Royalty Company v. City National Bank*, *supra* at 107; *First Southern Federal Savings v. First Southern Savings*, 614 F.2d 71, 73 (5th Cir. 1980).

The effect of the lower Court decision, contrary to *Erie*, is to eliminate state created rights.

At the outset, there can be no doubt that the manner in which the **Fifth Circuit** has addressed Petitioner's state law claim of resulting trust **has resulted** in a patently obvious inequitable administration of **federal law form over state law substance**.

The Fifth Circuit in *Sentry I* specifically found that it was not presented with the "resulting trust" issue and that its "decision finds the 'constructive trust' exception inapplicable."¹⁴

In ignoring the merits of the District Court's ruling that the findings of fact warranted the imposition of a resulting trust under Texas state law, and indeed the District Judge's inherent understanding that the resulting trust claim had never been adjudicated,¹⁵ the panel decision, relying on *obiter dictum*, found that the prior panel decision had adjudicated the resulting trust claim. Importantly, consistent with its failure to review the merits of the District Court's ruling on the resulting trust issue, the panel decision also found that it could not disturb the alleged resulting trust ruling of the prior panel even if it perceived the prior decision to be in error.

Such an administration of the law in federal court plainly results in no application of controlling substantive state law on the basis of resulting trust.

Under either possible scenario the Court has simply refused to conduct appellate review and application of substantive state

¹⁴*Sentry I*, 715 F.2d at 949, note 4.

¹⁵Who would better understand the fact that the resulting trust claim had never been adjudicated than the District Court that had not found it previously necessary to rule on the issue? For a graphic illustration of the fact that the resulting trust claim was not previously adjudicated until the District Court ruled favorably on Petitioner's resulting trust upon remand from *Sentry I* and *Sentry II*, see Appendix K, which also graphically demonstrates that a due process and equal protection gap are brought about by the I.O.P. provisions holding that the en banc court does not review state law issues, and *Sentry III*'s conclusion that it is impossible to not follow a prior panel on a state law issue even if it considers a prior panel adjudication to be erroneous on the state law issue.

law: (1) the panel erred in refusing to review the merits of the District Court application of state law since it erred in concluding that the resulting trust issue had been previously adjudicated, and in any event (2) even assuming *arguendo* that the resulting trust claim had been adjudicated by the prior panel, the panel erred in finding that it could not rule differently on the state law claim if it perceived the resulting trust ruling by the prior panel to be contrary to controlling state law.

The above circumstances, which result in the panel's refusal to review and apply the District Judge's correct interpretation of Texas state law on resulting trusts, are made even more acute by the fact that the Fifth Circuit refuses to consider state law issues in en banc review. The Court's Internal Operating Procedure for Suggestion for Rehearing En Banc provides that "[a]lleged errors in the determination of state law...are matters for panel rehearing but not for rehearing en banc." *Id.*

Under the circumstances of this case, therefore, it was impossible for Petitioner to have the appropriate resulting trust law applied by the Fifth Circuit for the following reasons: (1) The panel erroneously refused to review the District Court's appropriate ruling, (2) the panel erroneously refused to rule otherwise even if the prior panel was in error, and (3) the en banc procedures precluded en banc review of state law issues.

Likewise, as previously stated, since the panel decision has failed to affirm the District Court's appropriate interpretation of Texas state law on resulting trust, the Appeals Court has also rendered a decision that will encourage forum shopping contrary to the principles of *Erie*.

Assuming *arguendo* that *Sentry I* did rule on the resulting trust claim,¹⁶ as found by the panel decision, Petitioner respectfully submits that the discussion in *Sentry I* erroneously interprets Texas

¹⁶Assuming *arguendo* that the language wasn't *obiter dictum*.

resulting trust law and that it will encourage forum shopping.¹⁷

Although the sole issue raised before the *Sentry I* panel was that of constructive trust, the *Sentry I* court briefly commented on the resulting trust doctrine by stating that, "[t]he resulting trust analysis does not apply to this case, however, because it requires evidence of a shared intent to establish such a relationship as claimed in this case." 715 F.2d at 946.

The court's comments are unquestionably in error. Texas law does not require "a shared intent to establish a strict fiduciary relationship" in order to impose a resulting trust. Indeed, Appendix M to this petition contains a list of fifty Texas cases, representing all cases since 1955 in which the courts have discussed the issue of resulting trust, none of which include a requirement of a shared intent to establish a strict fiduciary relationship.

It is significant to note that *Sentry I*'s statement that there is no shared intent evidence in the record is in any event in error and inconsistent with its accepted findings of the District Court. Indeed, the Court, in accepting the findings of the District Court, found, for example:

"The findings of the District Court confirm that the confidential¹⁸ relationship between Whatley and Ward

¹⁷It again is significant to note that the "resulting trust" opinion (*Sentry III*) will now be encouraging even more forum shopping, since the "constructive trust" ruling of *Sentry I* had already set that area of the law up for forum shopping as well. Under that decision litigants breaking a fiduciary relationship encompassing the property at issue before the court will be encouraged to go to federal court. In all due respect, in a somewhat illogical opinion the *Sentry I* panel concluded that a breach of a fiduciary relationship regarding the property at issue before the Court is not sufficient to give rise to a "constructive trust." In an unprecedented interpretation of Texas law, the Court found that to give rise to a "constructive trust" there must be a breach of a prior, unrelated fiduciary relationship. Eg., *Sentry I*, 715 F.2d at 948, 950-951. See also Appendix L for a graphic illustration of this fact.

¹⁸Of course, "confidential relationship" and "fiduciary relationship" were used interchangeably by the Courts below. *Sentry I*, 715 F.2d at 946; see also Appendix I at 70.

The Court accepted these findings without challenge but, as previously stated, erroneously found that these facts were insufficient since they did not establish a prior fiduciary relationship unrelated to the property in issue. Contrary to holding the findings of the District Court "clearly erroneous" under Rule 52(a) of the Federal Rules of Civil Procedure, "the District found as a fact that Whatley acquired the Dyckman tract on behalf of Ward and with the understanding that it would be transferred to Ward." *Id.* at 949.

first arose when Ward became interested in the 490 acres, and that **'the agreement to buy the Dyckman property [the property in issue] was clearly within the scope of that prior agreement and made in furtherance of the prior agreement.'**

In specifically accepting the factual findings which it found allegedly necessary to support a resulting trust, the Court of Appeals likewise found:

We accept, nonetheless, the finding of the district court that there was an oral contract under which Whatley would hold the title to the Dyckman tract on behalf of Ward...Even adding the additional finding of the district court that there was a fiduciary relationship between the two, we conclude that the duty to transfer the property is still unenforceable...[as a constructive trust]

Id. at 949.

Importantly, however, the Court in the very same analysis later in the opinion held that such findings would support a "resulting trust":

Without a written trust agreement, such an arrangement would be unenforceable under the Texas Trust Act. **The exception to this general rule [is] known as 'resulting trust'...**

Id. at footnote 4.

The ruling of the District Court applying the Texas law of resulting trust was correct since Texas law on resulting trust is not ambiguous. In Texas, a resulting trust arises by operation of law when title to real property is conveyed to one person but the purchase price is paid by another. *Cohrs v. Scott*, 338 S.W.2d 127, 130 (Tex. 1960). Accord *Olcott v. Bynum*, 84 U.S. 44, 59 (1873). A resulting trust does not arise from any agreement between the parties, but as a matter of law. It is predicated upon the equitable doctrine of consideration. *Knox v. Levy*, 251 S.W.2d 911, 915 (Tex. Civ. App.—Texarkana 1952), *rev'd on other grounds*, 152 Tex. 291, S.W.2d 289 (1953). The parties are "presumed to have intended that the grantee hold title to the use of him who paid the purchase price and whom equity deems to

be the true owner." *Cohrs v. Scott*, 338 S.W.2d at 131. It is only necessary that the equitable owner shall have paid *or* obligated himself to pay all or part of the purchase price for the property. *Hammett v. McIntire*, 365 S.W.2d 844, 847 (Tex. Civ. App.—Houston [14th Dist.] 1962, writ ref'd n.r.e.).

In accordance with *Erie* Petitioner respectfully submits that is was incumbent upon the Fifth Circuit, as it was upon the District Court, to rule consistently with the substantive state law of resulting trusts set forth above. As demonstrated herein, failure to adhere to this precept has resulted in an inequitable administration of the law in federal courts which will also result in forum shopping.

2. The Decision of the Fifth Circuit Violates the Due Process Clause of the Fifth and Fourteenth Amendments

Petitioner respectfully submits that a review of the circumstances of this case plainly indicates that he has been denied procedural and substantive due process under the Fifth and Fourteenth Amendments.

Contrary to the well recognized American constitutional principle that an individual must be afforded due process of law before he may be deprived of property, the Fifth Circuit decision has (1) erred in reversing the District Court decision on the basis that the resulting trust claim regarding Petitioner's property was previously adjudicated, and (2) erred in refusing to apply the controlling substantive Texas law on resulting trust even if the panel perceived the resulting trust ruling by the District Court applying Texas law to be correct and perceived the prior panel decision to have applied the wrong substantive state law on resulting trust.

Indeed, Petitioner's denial of procedural and substantive due process is made even more egregious by the fact that the Fifth Circuit does not allow decisions applying state law rights, even if erroneously decided, to be heard in en banc rehearing.

Providing litigants due process is, of course, of paramount concern to the federal and state judicial system. Moreover, a fair administration and review of the very law providing the litigant

his underlying rights¹⁹ is the essence of due process.

For example, in articulating the underlying concepts of due process this court has recognized that,

...a purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests.

Carey v. Piphus, 435 U.S. 247, 262 (1977).

Likewise, inherent in the concept of due process is the principle that "no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause," *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 483 (1982). Due process is a relative concept taking its meaning at any given time, from the particular set of circumstances involved. *Id.*; *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981); Accord: *Carey v. Piphus*, supra at 266 (1978); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

Moreover, as pertinent to this case, the standard of **due process** is one of ensuring "fundamental fairness" **throughout the course of judicial proceedings**. See, e.g., *Lassiter v. Department of Social Services*, supra at 24 (1981); *Goldberg v. Kelly*, supra; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *United Home Rentals, Inc. v. Texas Real Estate Commission*, 716 F.2d 324, 330 (5th Cir. 1983); *Pederson v. South Williamsport Area School District*, 677 F.2d 312, 317 (3rd Cir. 1982).

In *Goldberg v. Kelly*, this Court thus recognized that "the fun-

¹⁹Consistent with *Erie*, state law of course provides Petitioner with the underlying resulting trust property protection which is being administered and reviewed by the federal system.

The law to be applied in the federal courts, whether jurisdiction is premised on the presence of a federal question or on diversity, is that **law that is the source of the right** sued on.

Keebler Co. v. Rovira Biscuit Corp., 624 F.2d 366, 371 (1st Cir. 1980) (citing *Erie*; *First Southern Federal Savings & Loan Ass'n. v. First Southern Savings & Loan Ass'n.*, 614 F.2d 71 (5th Cir. 1980); *Maternally Yours, Inv. v. Your Maternity Shop, Inc.* 234 F.2d 538, 540-541 n. 1 (2d Cir. 1956).

damental requisite of due process of law is the opportunity to be heard."²⁰*Id.* at 267.

Under the facts in this case, the **Fifth Circuit** has plainly **denied** Petitioner **a meaningful opportunity** to have his state law **resulting trust claim heard**, administered, and reviewed **fairly in the course of the judicial proceedings**.

Indeed, under the circumstances of this case **Petition was advised that the Circuit would not even correct** the application of state law to protect his property **if the District Court was right** and the **prior panel was wrong** as to his right to have his property protected through the imposition of a resulting trust.

In reviewing the particular circumstances of this case denying Petitioner due process, Petitioner, **at the outset**, respectfully submits that **Sentry I did not adjudicate the resulting trust claim**. Indeed, as previously stated, the prior panel specifically stated that it was deciding the constructive trust claim,²¹ and that the resulting trust claim was not involved in the appeal.²²

Moreover, who could possibly be in a better position to truly understand that the resulting trust claim had not gone up on appeal than the District Judge who, upon remand and review of the prior panel decision and mandate²³ nevertheless applied substantive Texas law to the facts of the case and concluded that a resulting trust should be imposed to protect Petitioner's property interests?

²⁰Petitioner would note that this principle is likewise consistent with the fundamental concept underlying *res judicata*, that the party has had a full and fair opportunity to litigate the issues involved. *Montana v. U.S.*, 440 U.S. 147, 153 (1970).

It is further significant to note that where different legal claims are presented, the decision in the first proceeding will not bar action in a second proceeding on a different claim. *Pipeline Co. v. U.S.*, 312 U.S. 502, 508 (1941). Moreover, the evidence to support a resulting trust differs materially from that of a constructive trust.

²¹*Sentry I*, 715 F.2d at 949, note 4.

²²*Id.*

²³The law is well established that a District Court may consider and determine any matters not addressed by the mandate. *Sprague v. Ticonic*, 307 U.S. 161, 168 (1939); *Ex parte v. Union Steamboat Co.*, 178 U.S. 317, 319 (1900); *In Re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895).

The action of the panel in *Sentry III* thus eliminated Petitioner's right to have his property interests regarding resulting trust heard and protected in accordance with controlling state law in violation of due process.

Additionally, the panel denied Petitioner due process when it concluded that it could not affirm the District Court's application of Texas law on resulting trust even if it perceived the decision to be correct and the decision of the prior panel to be in error.

The panel reached its erroneous conclusion upon holding that in the Fifth Circuit "...the law-of-the case doctrine is supplanted by our firm rule that one panel cannot disregard the precedent set by a prior panel even though it perceives error in the precedent." *Sentry III*, 806 F.2d at 1282.

Even assuming that this formulation of the Fifth Circuit's rule is correct, it operates to deny due process because the en banc court in accordance with the I.O.P. to Rule 35 will not review state law issues. Rather, state law questions are left to the panel to ensure that the federal court correctly applies controlling state substantive law. See Appendix K.

3. The Decision of the Fifth Circuit Violates Petitioner's Right To Equal Protection Under the Laws

Petitioner respectfully submits that the panel decision has operated to deny him equal protection under the law though required by the Fifth²⁴ and Fourteenth Amendments.

At the outset, it is significant to note that upon satisfaction of the IRS claims in the interpleader action which caused this case to be removed from state to federal court, Petitioner sought to have the remainder of the case solely involving state law issues involving his property interests removed back to state court for state adjudication of the issues. See Appendix G and H.

Petitioner humbly and respectfully submits, therefore, that if the federal system is to insist upon resolving his state law property interests, fundamental fairness and common sense require that the federal system assure that his state law property interests

²⁴It is well settled that the Fifth Amendment's due process clause encompasses equal protection principles. *Matthews v. DeCastro*, 429 U.S. 181, 182 at note 1 (1976).

be resolved in a manner consistent with his right to equal protection of the laws.

A review of the circumstances brought about by the panel decision plainly evidences that Petitioner has not been given the same application of the controlling law regarding his property interests that would have been provided in the state court. Indeed, it is significant to note that the panel would not provide a correct ruling on Petitioner's state law issue of resulting trust even if it perceived error.

Importantly, this Court reaffirmed in *Hanna v. Plumer* that with respect to litigation in federal courts involving substantive state law issues, it is inherent in the concept of equal protection "that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in federal court." 380 U.S. 460, 467 (1965). Indeed, *Hanna* further recognized that this concept in part formed the basis for the decision in *Erie. Id.*

Accordingly, the Fifth Circuit contrary to the dictates of equal protection plainly failed to affirm the District Court's correct application of the Texas law of resulting trust. Far to the contrary, the panel even expressly found that it would not apply the District Court's correct application of state law even if the prior panel's alleged ruling on resulting trust is in error.

Importantly, if the panel refuses to adhere to its own I.O.P. providing that state law issues are for panel reconsideration rather than en banc reconsideration, then the Fifth Circuit through its rules of decision has effectively extinguished any device in the Circuit to correct prior panels' misinterpretation and misapplication of controlling state law regardless of how wrong or erroneous its consequences.

Indeed, as specifically acknowledged by this Court:

neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law.

Hanna v. Plumer, 380 U.S. at 471-472.

Moreover, even assuming that the panel correctly applied its rules and procedures, the manifest injustice resulting from the prior panel's clearly erroneous decision must be corrected. See, *White V. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967).

While Petitioner recognizes the salutary and sound policy underlying the need to bring an end to litigation, Petitioner respectfully submits that the **fundamental principles of equal protection** established by a long line of cases by this Court **cannot be sacrificed** for the mere sake of form over substance in the judicial process.

In administering the substantive rights of litigants through our judicial system, fundamental consideration for due process and equal protection dictates that our system operate as a shield to protect the rights of individuals as opposed to a sword.

4. The Decision of the Fifth Circuit Violated the Rules of Decision Act

In addition to the previously discussed violations of Petitioner's constitutional rights and violations of judicial policy enunciated in *Erie*, Petitioner respectfully submits that the panel decision has likewise violated the Rules of Decision Act.²⁵

As the Court is aware, the Rules of Decision Act²⁶ directs federal courts to apply state substantive law except where federal issues are involved.

As previously discussed and demonstrated, it is clear that the panel decision, in refusing to affirm the ruling of the District Court applying Texas substantive law on resulting trust, chose not to concern itself with whether Texas substantive law was correctly applied.²⁷

5. In Light of the Constitutional Violations and Manifest Injustice Brought About For Petitioner and Innumerable State Law Litigants in Federal Court, This Court Should Exercise Its Supervisory Authority

In accordance with Supreme Court Rule 17.1 (a), exercise of

²⁵28 U.S.C. Section 1652 (1976).

²⁶We submit, consistent with Article III of the United States Constitution.

²⁷ See *Sentry III* 806 F.2d at 1282.

the Court's broad supervisory authority is warranted since the Fifth Circuit has failed to decide a substantive state law issue consistent with controlling state law. It is well established that the Court has elected to exercise its supervisory authority in instances calling into question proceedings in the federal courts. See, e.g., *Bankers Life and Casualty Co. v. Holland*, 346 U.S. 379, 381 (1953); *Defense Corp. v. Lawrence Co.*, 336 U.S. 631, 639, (1948); *Missouri, ex rel. v. Public Service Commission*, 273 U.S. 126, 131 (1926); *Dorchy v. Kansas*, 264 U.S. 286, 289 (1923).

Petitioner respectfully submits that as shown above, since the Fifth Circuit's decision on issues of substantive Texas law are clearly incorrect, this Court in exercising its supervisory authority may overturn the court below. *Estate of Spiegel v. Commissioner of Internal Revenue*, 335 U.S. 701, 708 (1949); *Helvering v. Stuart*, 317 U.S. 154, 163 (1942).

Alternatively, the Court may direct the court below to certify the state law issue of resulting trust to the Texas Supreme Court for a determinative resolution of the controlling state law. *Mills v. Rogers*, 102 S.Ct. 2442, 2452 (1982); *Bellotti v. Baird*, 428 U.S. 132, 150-151 (1975); *Lehman Brothers v. Scheir*, 416 U.S. 386, 390-391 (1973).

Certification of state law issues is consistent with the dictates of *Erie* and case law establishing the right of state courts to be the "final expositors" on state law issues. *Brady v. Maryland*, 373 U.S. 83, 90 (1963); *Huddleston v. Dwyer*, 322 U.S. 232, 236 (1944). It is also consistent with the policies of comity and a system of "cooperative judicial federalism." *Bellotti v. Baird*, *supra* at 151.

Importantly, Texas recently enacted Rule 114 authorizing a certification procedure. Certification of the substantive state law issue of resulting trust would provide the same result and correct the constitutional deprivations occasioned by the Fifth Circuit, as if the District Court had originally granted Petitioner's Motion to Remand after dismissal of the IRS.

Rule 114 also authorizes review by the Texas Supreme Court of state law issues certified to it by this Court.

While Petitioner strongly maintains that this Court should grant certiorari and reverse the panel decision for its patently unconstitutional results, Petitioner submits that at a minimum, the

Fifth Circuit should be directed to have the state law issue certified to the Texas Supreme Court for resolution.

In fact, certification to the Texas Supreme Court under the circumstances of this case would render far more equitable results for Petitioner and future state law litigants than simply allowing the panel decision to stand. Indeed, the panel decision itself in interpreting the rules of judicial administration in the Fifth Circuit, found that it could not provide a different application of Texas law than that allegedly provided by the prior panel in *Sentry I* even if it was thoroughly convinced the decision was in error.

As likewise previously discussed, this inequity is rendered even more untenable by the fact that the Fifth Circuit refuses to hear state law issues in en banc proceedings.

When one considers the fact that of all the Texas decisions reviewed in the area of resulting as well as constructive trusts, the Petitioner has found no cases²⁸ ruling consistent with the interpretations of Texas law in the *Sentry* decisions, it seems that on balance, certification at a minimum is warranted with no prejudice to the Fifth Circuit and to avoid undue prejudice to Petitioner and innumerable litigants.

Finally, in all due respects, Petitioner submits that the error rendered by the panel decision in the circumstances of this case clearly warrants exercise of the supervisory authority of this Court.

To truly understand the unfair, inequitable and manifestly unjust results imposed upon Petitioner, it is perhaps appropriate to review this case in perspective.

Indeed, while this decision is on appeal now regarding the resulting trust claim, as opposed to the constructive trust claim, in an attempt to protect Petitioner's property rights under Texas law, the strong exception to *Sentry I* stated by Judge Will still aptly characterizes the circumstances of this case:

...the basic error of the majority holding remains uncorrected. A man who admittedly breached his

²⁸See Appendix L and M.

fiduciary duty²⁹ is still to be rewarded by receiving what now appears to be in excess of [\$800,000] when neither the uncontested facts nor the Texas [or Fifth Circuit] law justify, much less require, such an unjust and inequitable result.

...
Sentry II, 727 F.2d at 1373.

...
I cannot in good conscience join in a decision which will reward perfidy and breach of trust with more than [\$800,000], an amount which even in Texas, must be substantial.

Sentry I, 715 F.2d at 961.

Indeed, consistent with Judge Wills' remarks, in all due respect, the prior panel decision was illogical in its reasoning and impact on Petitioner. Incredibly, the decision concluded that while a fiduciary relationship did in fact exist regarding the very property in issue and concluded that it was in fact the understanding of the parties that Respondent was holding the property on behalf of Petitioner, the court in an unprecedented ruling found that to impose a constructive trust protecting Petitioner's property rights, there must have been a fiduciary relationship regarding a totally unrelated transaction!

By requiring that there be a separate unrelated fiduciary relationship, the decision consistent with Judge Wills' remarks, allows a breach of a fiduciary relationship regarding the very property at issue to be rewarded.

As pertinent to the present decision on appeal to the Court regarding the resulting trust claim in an attempt to protect Petitioner's property rights, it is significant to note that the District judge who originally decided the case still considered it appropriate and necessary to apply the resulting trust remedy provided by Texas law.

The District Court decision notwithstanding, however, the Fifth Circuit has once again exacerbated the inequitable results of Petitioner being required to litigate his state law property claims in

²⁹As previously demonstrated, the prior panel as well as the present panel accepting the prior decision, have specifically recognized that a fiduciary relationship existed regarding the very property at issue in this litigation.

federal court, by now incredibly concluding that the resulting trust claim was adjudicated in the prior appeal when the District Judge thinks otherwise, and the prior panel decision itself stated, (1) its decision was limited to the constructive trust claims; (2) resulting trust was not involved in the appeal; and (3) under the facts presented, the only exception the Court saw as providing a remedy was the Texas law of resulting trust which was not involved in the appeal before the Court.

Finally, as though it was not enough to ignore Petitioner's state law resulting trust claim ruled favorably upon by the District Court, the panel has now stated that under the rules of the Fifth Circuit its hands are tied to provide Petitioner his state law remedy of resulting trust, even if the District Court decision is correct and the prior panel decision is wrong!

While this case has previously been before the Court on Petition for Certiorari regarding the constructive trust claim, the further decision of the Circuit Court has now raised this case to a level of patent violation of constitutional rights and to a level of public import that cries for relief and ought not to be ignored.

CONCLUSION

For the reasons stated herein, Petitioner respectfully requests that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Hiram C. Eastland, Jr.
(Counsel of record for Petitioner)
Eastland Law Offices
6360 I-55 North, IBM Building
Jackson, Mississippi 39211
(601) 956-0154

CERTIFICATE OF SERVICE

I, Hiram C. Eastland, Jr., one of the attorneys for Petitioner herein, am a member of the bar of the Supreme Court of the United States, hereby certify that on the 6th day of May, 1987, I served copies of Petitioner's foregoing Petition for a Writ of Certiorari on the party hereto by mailing three copies of said document by United States mail, in duly addressed envelopes, with postage prepaid, to each of the following persons:

1. J. Albert Kroemer, Esq.
Mathews, Kroemer & Johnson
2000 One Main Place
Dallas Texas 75252

I further certify that all parties required to be served have been served.

Hiram C. Eastland, Jr.
Hiram C. Eastland, Jr.

